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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT AMAYA, JR., Defendant and Appellant.	E061545 (Super.Ct.No. RIF1301976) OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner, Judge. Affirmed as modified.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Lynne G. McGinnis and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

Robert Amaya, Jr., defendant, wearing a ski mask and Dallas Cowboys gloves, along with his brother Armando, robbed a Circle K store clerk at gunpoint in the early hours of the morning. The crime was recorded on surveillance video which was posted on public media in hopes of learning the identity of the robbers. A parole officer identified the unmasked perpetrator from the video as Armando. A subsequent nail salon robbery by a person with similar stature, wearing a ski mask and Dallas Cowboy gloves, led to suspicion that the masked robber was the same individual who robbed the Circle K. After the nail salon robbery, defendant was found asleep in a car where a gun similar to that used in both robberies, as well as property taken from the victims of the nail salon robbery, were found. Defendant was charged in the Circle K case with robbery (Pen. Code, § 211),[1] along with an allegation of gun use (§ 12022.53, subd. (b)), commercial burglary (§ 459), and witness intimidation (§ 136.1, subd. (b)(1).) Convicted of all counts, he was sentenced to prison for a determinate term of 10 years and an indeterminate term of 25 years to life. He appealed.

On appeal, defendant argues it was error to admit opinion evidence from two witnesses that defendant was the same masked individual in both robberies; error to admit evidence of the nail salon robbery pursuant to Evidence Code section 1101, subdivision (b), and an argument that the cumulative effect of the errors was prejudicial. He also challenges the sufficiency of the evidence that he aided and abetted his brother's witness intimidation; the failure to instruct using CALCRIM No. 401 as to the witness

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[1] All further references are to the Penal Code unless otherwise indicated.

intimidation count; failing to stay the sentence for the witness intimidation count pursuant to section 654, and improperly imposing restitution fines pursuant to later enacted legislation. We modify the sentence and affirm as modified.

BACKGROUND

The Circle K Robbery

On November 20, 2011, Deborah H. worked the graveyard shift at a Circle K in Riverside. At about 2:30 a.m., she locked the entrance so she could restock the beer cooler. As she did so, someone came to the entrance and knocked at the door. She asked where his car was, and the individual said he had walked there. He seemed all right so Deborah let him in, locking the door behind him.

The customer asked her questions about prices of various items, and as Deborah walked back to the counter, she saw him unlock the front door. Before she could react, another individual entered the store, wearing a ski mask, checkered shorts, and Dallas Cowboy gloves,[2] pointing a gun at her. The masked suspect (later identified as defendant) told Deborah to get on the floor, and forced her to crawl in the direction of the

[2] The victim did not directly testify about the clothing worn by the masked suspect. However, the surveillance video was played during her testimony and she was shown still shots of the robbers while testifying. Although the witness was not asked, based on our view of the video, and the testimony of other witnesses who viewed the videotape and were involved in the investigation, we have gleaned that the masked suspect wore checkered (or black and white plaid) shorts and gloves bearing the insignia of the Dallas Cowboys during the robbery. In the video, he also appeared to be wearing a black hooded sweatshirt with the letters "LA" in large manuscript letters on the back.

cash registers by kicking her. At the registers, the masked gunman told her to open it while the unmasked man went to the cooler to get beer.

After Deborah opened one register, the masked gunman yelled at her to open the second one, yelling at her that he knew she could do it when she said she couldn't open it. The unmasked robber told her not to be stupid or some people would get hurt. The masked gunman took money from the first register while she attempted to open the second register, and then told her to get down on the ground. The gunman took money from both registers, but insofar as only $35.00 was kept in each one, he only got approximately $70.00, plus approximately $40.00 in extra twenty-dollar bills.

As the gunman removed the money, the unmasked man reached inside her pockets and took her wallet and cell phone, telling her he knew where she lived now. Then the unmasked man took three 18-packs of beer from the cooler and the two left the store, telling her it was nice doing business with her and that if she pressed any alarms, she was done.

The robbery was recorded on a surveillance video which was turned over to police. Detective David Smith was assigned as an investigator and viewed the video along with all the related police reports. He noted that both suspects had similar build and were short in stature compared to the victim, who was 5' 5" tall. The suspect with the gun wore distinctive shorts. Detective Smith sent stills from the video out to patrolmen at various stations, and to investigators at the Riverside Police Department to

see if anyone had a similar suspect description in other crimes, or if someone recognized the unmasked subject.

On March 20, 2012, Detective Smith received a tip from someone who identified the unmasked suspect as Armando Amaya. The detective obtained a photograph of Armando Amaya and compared it to the person depicted in the surveillance video; the photo of Armando Amaya looked like the unmasked person in the video. Detective Smith showed the video to Jorge Ibarra, Armando Amaya's parole officer. Ibarra also identified the unmasked subject as Armando Amaya. Ibarra knew that Armando Amaya had a brother, Robert Amaya, the defendant, who had stature similar to Armando. Ibarra informed the detective that defendant had a tattoo on his face.

Detective Brian Jones, who assisted Detective Smith, conducted a search of Armando Amaya's residence. He found a basket of clothing that included checkered shorts and a sweatshirt, similar to the clothing worn by the masked robber in the surveillance video.

Uncharged Incident: The Rose Nail Salon Robbery

On December 15, 2011, Arinda A. and her teenage daughter went to Rose Nail Salon for manicures and pedicures. Josephine N., the proprietor of the shop, and Josephine's sister-in-law, were working in the shop that day. While Arinda's feet were soaking for the pedicure, she saw a Hispanic male driving past the front of the shop two or three times. The man had a tattoo on his face. Arinda identified defendant as the person she saw drive past the nail salon.

After he drove past the last time, and Arinda had turned to the manicure table, the door opened and a man, wearing a ski mask and pointing a gun at them, entered the store and ordered everyone to put their hands up. In addition to the ski mask, the man was wearing black clothing (a hooded sweatshirt and pants) and Dallas Cowboy gloves. He was short, and had a tattoo below his left eye.

The masked man then put the gun to Arinda's head and demanded money from Josephine. Josephine opened the drawer in which she kept the money and gave it to him; he pocketed approximately $70.00 or $90.00, but demanded more. When Josephine told him there was no more money, he took her sister-in-law's camera and phone. Then he turned his attention to Arinda's daughter, but Arinda protested that she was just a child. The robber said he did not care, so Arinda, whose hands were still raised, kicked her purse over to him and told him to take it. The robber grabbed Arinda's phone, threw it in her purse, and took it, telling the women that if they called the police he would come after them. Along with Arinda's purse, the robber took her phone, tablet, and various pieces of identification. The robber then pointed the gun at Josephine and demanded her necklace, which she ripped off.

San Bernardino County Sheriff's Deputy Danny Rice encountered defendant asleep in a vehicle parked in a parking lot at a city park in San Bernardino County approximately 4:56 a.m. on December 17, 2011. Defendant identified himself and answered in the affirmative when the deputy inquired if he was armed. Defendant said he

was transient and was eventually placed under arrest.[3] The deputy found a nine mm Berretta semiautomatic in the center console of the car. He also found tee-shirts, a lanyard and other paraphernalia relating to the Dallas Cowboys in the car, as well as a tablet, a watch, a camera and some jewelry, which were placed in an evidence locker. However, no Dallas Cowboys gloves and no ski mask were located in the car.

On the same date as the contact with defendant, Deputy Rice made up a flyer, which included a photo of defendant and the vehicle he was found in, and sent to the intelligence department for distribution to local law enforcement agencies. At the time of defendant's arrest, Deputy Rice was unaware of the two robberies.

On January 4, 2012, Detective Gerald Leininger of the San Bernardino County Sheriff's Department, who was assigned to investigate the Rose Nail Salon robbery, received one of the flyers made up by Deputy Rice. Leininger thought the arrest of defendant might be relevant to the robbery he was investigating because of the descriptions of the suspect and the car, as well as the description of a tattoo on the side of defendant's face.

Leininger reviewed Deputy Rice's report and noted mention of a Blackberry tablet bearing the same serial number as that of the tablet stolen in the nail salon robbery. Additionally, he was struck by the fact that a watch and camera were found in defendant's car. He then obtained a search warrant for defendant's car, where Leininger

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[3] During in limine proceedings, it was established that the deputy had arrested defendant, but it was agreed that no mention would be made of the fact defendant was on parole.

found Arinda's driver's license and social security card, as well as her son's school identification, Josephine's necklace, and other items. Josephine later identified the necklace as the one that was taken from her in the robbery, and Arinda identified the tablet, watch, credit and identification cards. Josephine identified defendant as the robber.

In the meantime, Arinda had seen a video regarding the Circle K robbery on the news, and noticed that the masked robber was dressed like the man who had robbed her at the nail salon. She told the investigator that the Dallas Cowboy gloves and the ski mask worn by the robber in the video looked like the same items worn by the man who robbed her.

Criminal Proceedings

By an amended information, defendant was charged with robbery of the Circle K (§ 211, count 1), personal use of a firearm in the commission of the felony (§ 12022.53, subd. (b), special allegation to count 1), commercial burglary (§ 459, count 2), and witness intimidation (§ 136.1, subd. (b)(1), count 3). It was further alleged that he had eleven prior convictions for serious or violent felonies within the meaning of the Strikes law (§ 667, subds. (c) & (e)(2)(A)). During his jury trial, the court admitted evidence of the Rose Nail Salon robbery as an uncharged act within the meaning of Evidence Code, section 1101, subdivision (b), to prove identity. The jury found defendant guilty of all charges and made a true finding as to the gun use allegation. In a separate proceeding,

the court made a true finding as to the eleven prior convictions alleged under the Strikes law.

At sentencing, the court denied probation and sentenced defendant to an indeterminate term of 25 years to life on count 1, with a consecutive determinate term of 10 years for the gun use. The court stayed a two-year term for the commercial burglary in count 2, pursuant to section 654, and imposed a consecutive 25 year-to-life term for count 3, the witness intimidation count. The total term imposed was 10 years consecutive to 50 years to life. Defendant appealed.

DISCUSSION

1. *Detective Smith's Opinion that Defendant Was the Masked Suspect Was Properly Admitted.*

Defendant argues it was error to permit Detective Smith to testify to his opinion that defendant was the masked suspect in the Circle K robbery. Specifically, he urges that the opinion testimony, admitted over objections that it was speculation, lacking foundation, and irrelevant, did not assist the jury, but instead constituted closing argument presented from the witness stand.[4] We disagree.

"The identification testimony of the witness viewing the film of the robbery may be considered lay opinion on the question of the identity of the person depicted therein

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[4] He also mentions in passing that the court failed to instruct the jury with CALCRIM No. 332, relating to expert testimony. However, this argument was not developed so we do not reach it. In any event, the opinion was not offered as expert opinion, because any witness could look at the video and draw comparisons, as Arinda A. did in her testimony.

inasmuch as the witness was not qualified as an expert in film reading or interpretation." (*People v. Perry* (1976) 60 Cal.App.3d 608, 612 (*Perry*).) Lay opinion is admissible but testimony is limited to an opinion that is (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of his testimony. (Evid. Code, § 800.) Admission of lay opinion testimony is within the discretion of the trial court and will not be disturbed unless a clear abuse of discretion appears. (*People v. Mixon* (1982) 129 Cal.App.3d 118, 127.)

"Court of Appeal decisions have long upheld admission of testimony identifying defendants in surveillance footage or photographs." (*People v. Leon* (2015) 61 Cal.4th 569, 601 (*Leon*).) In *Perry, supra,* the reviewing court rejected claims that allowing a witness to identify the defendant in surveillance footage was proper and helpful to the jury because the defendant had changed his appearance by shaving his mustache before trial and the officer's opinion was based on his contacts with the defendant and the perception of the film taken of the events. (*Perry*, *supra*, 60 Cal.App.3d at p. 613.) Questions about the extent of the witness's familiarity with the defendant's appearance went to weight, not admissibility. (*Ibid.*)

In *Leon,* the officer's familiarity with the defendant's appearance began when the defendant was arrested, after the robbery. (*Leon*, *supra*, 61 Cal.4th at p. 601.) The court noted that the surveillance video was played for the jury so jurors could make up their own minds about whether the person shown was defendant, in ruling the evidence admissible. (*Ibid.*)

Here, the detective's familiarity with defendant's appearance began after he was arrested. The testimony was helpful because the defendant disguised his appearance during the robberies by wearing a mask to cover his facial tattoo. Nevertheless, the victims of the robberies had observed the defendant's eyes and saw a portion of a tattoo despite the ski mask. The witness's testimony aided the jury because the detective had information from Detective Leininger and photographs of defendant which provided him greater information about defendant's short, stocky stature and tattoos.

The officer did not testify to his opinion of defendant's guilt and did not testify as an expert; he offered solely an opinion that defendant was the same person on the video. The detective had access to much more information about the defendant, his stature, tattoos, and his proclivity for Dallas Cowboys clothing. Moreover, the surveillance video was played for the jury so the jurors could make up their own minds. The lay opinion as to identity was admissible.

There was no abuse of discretion.

2. *Evidence of the Rose Nail Salon Was Admissible to Prove Identity Pursuant to Evidence Code section 1101, subdivision (b).*

Defendant argues that the trial court erred in admitting evidence of the Rose Nail Salon robbery pursuant to Evidence Code, section 1101, subdivision (b), because the two robberies were not sufficiently similar. We disagree.

A jury is permitted to consider all relevant evidence. (Evid. Code, § 351.) Evidence that a defendant has committed crimes other than those currently charged is not

admissible to prove that the defendant is a person of bad character or has a criminal disposition, but such evidence is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes, but only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.)

"'The strength of the inference in any case depends on two factors: (1) the *degree of distinctiveness* of individual shared marks, and (2) the *number* of minimally distinctive shared marks.'" (*People v. Kipp* (1998) 18 Cal.4th 349, 370, citing *People v. Thornton* (1974) 11 Cal.3d 738, 756 [italics in original], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.) To be highly distinctive, the charged and uncharged crimes need not be mirror images of each other. (*People v. Carter* (2005) 36 Cal.4th 1114, 1148 (*Carter*).) Certain differences in the crimes go to the weight of the evidence, not the admissibility. (*Id*. at p. 1148.)

On appeal, the trial court's determination of this issue is reviewed for abuse of discretion. (*Carter, supra,* 36 Cal.4th at p.1147.)

Viewing the evidence in the light most favorable to the trial court's ruling, the charged and uncharged offenses displayed common features that revealed a distinctive pattern. First, in each case, the defendant was dressed in black; that clothing included a ski mask, a black hooded sweatshirt, and a pair of Dallas Cowboys gloves. In each case,

the defendant carried a black handgun. In each case, the defendant took a victim's wallet and cell phone after robbing the establishment, and threatened the victims with harm if they contacted police.

Viewed individually, each feature would be considered non-distinctive. However, the odds that there would be two short, stocky robbers, who would choose to wear a ski mask and Dallas Cowboy gloves, and using a black semiautomatic handgun, together create a distinctive pattern. Add to this the fact that one of the victims of the nail salon robbery saw the surveillance video of the Circle K robbery and identified the masked robber as having the same stature, ski mask, and gloves as the person who robbed her. While not mirror images of each other, the charged and uncharged acts shared sufficient distinctive features to raise a rational inference that the same individual committed both crimes.

3. *Identification by a Victim of the Nail Salon Robbery that the Suspect in the Surveillance Video Was the Same Person Who Robbed Her Was Admissible.*

Defendant argues that it was error to allow Arinda A. to testify that the masked suspect on the surveillance video was the same person who robbed her at the Rose Nail Salon. Specifically, defendant argues Arinda A. lacked sufficient personal knowledge of the nail salon robber to identify him as the masked suspect in the surveillance video. We disagree.

We have previously recited the general legal principles applicable to the admissibility of lay opinion evidence of identity. Those principles apply equally here.

As we have indicated above, the degree of the witness's personal knowledge of the defendant's appearance goes to the weight rather than to the admissibility of the opinion. (*People v. Larkins* (2011) 199 Cal.App.4th 1059, 1066-1067, quoting *People v. Perry, supra,* 60 Cal.App.3d at pp. 127-131.) None of the authorities cited by defendant refer to a litmus test of minimal familiarity required to justify admission of witness's identification of the person.

Here, Arinda A. had sufficient personal knowledge where she had seen the masked suspect in person in December of 2011, before she had seen the surveillance video. She was able to observe his stature, as well as the way he walked, and she also heard him speak on both occasions. She also had an opportunity to observe defendant unmasked, as he drove past the nail salon several times prior to the robbery. Her identification was helpful to the jury because she saw the masked robber on two occasions: during the nail salon robbery, and on the surveillance video of the Circle K robbery. There was adequate foundation for her opinion; the degree of her knowledge of defendant's appearance went to weight, not admissibility. There was no error.

4. *There Was No Cumulative Error.*

Defendant argues that the cumulative effect of the evidentiary errors resulted in prejudice, requiring reversal. We disagree.

"'[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.'" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009, quoting *People v. Hill* (1998) 17 Cal.4th

800, 844.) However, because we found no errors, there can be no prejudicial cumulative impact.

5. *Substantial Evidence Supports Defendant's Conviction for Witness Intimidation as an Aider-Abettor.*

Defendant argues there is insufficient evidence that he knew of or shared Armando's unlawful purpose in the witness intimidation count to support his conviction on count 3 as an aider and abettor. We disagree.

In reviewing a sufficiency of evidence claim, our role is limited; we determine whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Smith* (2005) 37 Cal.4th 733, 738-739 (*Smith*).) On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see also, *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 99 S.Ct. 2781].) Reversal is unwarranted unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the conviction. (*People v. Mason* (2006) 140 Cal.App.4th 1190, 1199.)

Substantial evidence must be of ponderable legal significance, reasonable in nature, credible and of solid value. (*People v. Concha* (2008) 160 Cal.App.4th 1441, 1451.) While we must ensure that the evidence is reasonable, credible and of solid value, it is the exclusive province of the judge or jury to determine the credibility of a witness

and the truth or falsity of the facts on which that determination depends. (*Smith, supra*, 37 Cal.4th at p. 739.) The uncorroborated testimony of a single witness is sufficient to support a conviction unless it is physically impossible or inherently improbable. (*People v. Duncan* (2008) 160 Cal.App.4th 1014, 1018.)

Section 31 provides in relevant part that all persons concerned in the commission of a crime, or who aid and abet in its commission, are principals in any crime so committed. To prove liability as a principal, the prosecution must show an aider and abettor intended to facilitate or encourage the principal offense prior to or during its commission. (*People v. Cooper* (1991) 53 Cal. 3d 1158, 1160.) For purposes of determining liability as an aider and abettor, the commission of robbery continues so long as the loot is being carried away to a place of temporary safety. (*Id.* at pp. 1169-1170.)

"'Once the necessary mental state is established, the aider and abettor is guilty not only of the intended, or target, offense, but also of any other crime the direct perpetrator actually commits that is a natural and probable consequence of the target offense. [Citation.]' [Citation.]" (*People v. Leon* (2008) 161 Cal.App.4th 149, 158 (*Leon*).) "'To trigger application of the "natural and probable consequences" doctrine, there must be a close connection between the target crime aided and abetted and the offense actually committed.'" (*Id*. at p. 158, quoting *People v. Prettyman* (1996) 14 Cal.4th 248, 269.)

Here, both defendant and his brother, Armando, were active participants in the Circle K robbery. Defendant removed money from the cash register drawers after kicking and prodding the victim towards the registers, while his brother Armando went

through the victim's pockets. As both brothers engaged in the robbery, Armando, who had removed the cell phone and wallet from the victim, told her that now they knew where she lived. This was reasonably interpreted by the victim as a threat that they would come after her if she reported the crime. Defendant was inches away from his brother at the time of this statement by his brother and did not contradict it. Then the two picked up the three 18-pack cases of beer and exited the store, with a parting warning by Armando, who told her not to press any alarms or she was "done."

Defendant was not a mere bystander in the witness intimidation. His presence with the gun gave the threat "teeth" and increased the victim's fear that the threat would be carried out. There is substantial evidence to show he shared the mental state of his brother with knowledge of his brother's intent.

6. *The Court's Failure to Instruct the Jury with CALCRIM No. 401 as to the Witness Intimidation Count Was Harmless Error.*

Defendant argues that the court erred in failing to instruct the jury with CALCRIM No. 401, relating to the mental state required to convict on the basis of aiding and abetting, requiring reversal of count 3, the witness intimidation offense. Defendant correctly points out that the trial court has a sua sponte duty to instruct that a defendant must act with knowledge of the unlawful purpose of the perpetrator, with intent or purpose of committing, encouraging, or facilitating the commission of the offense, and by act or advice aids, promotes, encourages or instigates the commission of the crime.

(*People v. Beeman* (1984) 35 Cal.3d 547, 560-561 (*Beeman*).) However, any error committed by the trial court was harmless beyond a reasonable doubt.

A court has a sua sponte duty to instruct on aiding and abetting when the prosecutor relies on it as a theory of culpability. (*Beeman, supra*, 35 Cal.3d at p. 561.) The failure to instruct is a failure to instruct on the criminal intent element, a federal constitutional error. (*People v. Prettyman* (1996) 14 Cal.4th 248, 271, citing *People v. Croy* (1985) 41 Cal.3d 1, 12-16.)

However, this was not a complete failure to instruct on aider-abettor liability altogether; instead, the failure to give the additional instruction amounted to an ambiguity, similar to the ambiguity created in *Prettyman* by the court's failure to instruct as to the target offense under the natural and probable consequences doctrine. As such, we review any error to determine whether it appears beyond a reasonable doubt that the error did not contribute to this jury's verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Hardy* (1992) 2 Cal.4th 86, 186.)

Here, the two robbers acted as a team, a well rehearsed team. Armando gained entrance to the store through subterfuge, and admitted defendant into the store, which he entered with his gun drawn. Both defendants forced the victim to the area where the registers were situated, ordering her onto the ground and kicking her as she crawled on all fours. The defendant ordered her to open the registers while Armando went to get beer from the cooler. The victim opened the first register, and the defendant yelled at her to

open the second one, but she said she couldn't do it. Defendant told her he knew she could do it, and that he did not want to hurt her.

The victim eventually opened the second register. While defendant emptied the cash registers, Armando took the victim's cell phone and wallet, telling her they ("we") knew where she lived. Then the two perpetrators made their way out of the store as Armando warned the victim not to sound any alarms. Defendant's conduct ratified his brother's threat, insofar as his presence with the gun as the two perpetrators exited the store gave weight to Armando's threat. A rationale trier of fact would conclude that the defendant shared his brother's intent. The error in failing to instruct the jury with CALCRIM No. 401 was harmless beyond a reasonable doubt.

7. *Section 654 Compels a Stay of Count 3.*

Defendant argues that the sentence for count 3, the witness intimidation count, should have been stayed pursuant to section 654, because it was part of an indivisible course of conduct involved with the robbery. We agree.

"Section 654 precludes multiple punishments for a single act or indivisible course of conduct." (*People v. Hester* (2000) 22 Cal.4th 290, 294; *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1262 (*Galvez*).) """Whether a course of conduct is divisible . . . depends on the *intent and objective* of the actor."""" (*Galvez, supra*, at p. 1262, quoting *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, the defendant may be found to have harbored a single intent, thereby precluding multiple

punishment. (*Ibid*.) If, however, he harbored multiple criminal objectives, which were independent of, and not merely incidental, to each other, he may be punished for each violation committed pursuant to each objective, even though they may have shared common acts or were parts of an otherwise indivisible course of conduct. (*Id*. at pp. 1262-1263.)

In *Galvez*, the defendant argued that the witness dissuasion count charge was incidental to the robbery because the defendant's objective in the witness dissuasion and the robbery of the cell phone was to prevent the witness from using his cell phone to report the crimes to law enforcement. The court agreed with the defendant's contention that section 654 precluded punishment for both robbery and the witness dissuasion offense in that case.[5] (*Galvez, supra,* 195 Cal.App.4th at p. 1263.) The objectives of each offense were incidental to each other because when defendant committed the witness dissuasion offense, his intent and objective was to prevent the witness from reporting the crime to law enforcement. (*Ibid.*) That situation was played out in this case.

Robbery continues until the perpetrators have won their way to a place of temporary safety. (*People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1374.) The scene of a robbery is not a place of temporary safety. (*People v. Haynes* (1998) 61 Cal.App.4th

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[5] However, it rejected the defendant's contention that section 654 precluded punishment for both the felony assault and attempting to dissuade a witness. As to those offenses, the witness had dropped his cell phone at about the same time as other gang members stomped and kicked him, and the objective in the assault was to enhance the gang's reputation for violence. (*Galvez, supra*, at p. 1263.)

1282, 1292.) The threat was made as the defendant and Armando exited the store, on their way to a place of temporary safety. The purpose of the threat was to insure the police were not notified, so the two robbers could make their escape to a place of temporary safety. The threat was incidental to the robbery. As such, the sentence must be modified to stay the term for count 3.

8. *Restitution Fines Must Be Modified.*

Defendant argues that the court erred in imposing a $300 for the restitution fine pursuant to section 1202.4, as well as the parole revocation restitution fine pursuant to section 1202.45, which was stayed. He notes that at the time he committed his offenses, the statutory minimum restitution fine was $200.00, and that it was a violation of ex post facto principles to impose an amount based on a 2014 statutory amendment. We agree.

Defendant committed his crimes in 2011. At the time defendant committed the crimes, former sections 1202.4, subdivision (b) and 1202.45 provided for a minimum restitution fine in the amount of $200.00. Section 1202.45 required imposition of a restitution fine in the same amount in the event a defendant violates parole. By the date of the sentencing hearing, the two statutes had been amended, providing for a minimum restitution fine in the amount of $300.00. (Stats. 2012, ch. 868, § 3, pp. 7181-7182; Stats. 2012, ch. 873, § 1.5, p. 7237; Stats. 2012, ch. 762, § 1, p. 6118.)

"It is well established that the imposition of restitution fines constitutes punishment and [is] therefore subject to the proscriptions of the ex post facto clause and other constitutional provisions." (*People v. Souza* (2012) 54 Cal.4th 90, 143.) The

application of the law in effect at the time of defendant's sentencing rather than the law in effect at the time the offense was committed violates the constitutional prohibition against ex post facto laws. (*Ibid.*)

The People argue that defendant forfeited this claim by failing to object. The rule of forfeiture applies to ex post facto claims, where the error could easily have been corrected had the issue been raised. (*People v. Martinez* (2014) 226 Cal.App.4th 1169, 1189 (*Martinez*), citing *People v. White* (1997) 55 Cal.App.4th 914, 917.) To avoid forfeiture, defendant posits that he received ineffective assistance of counsel.

To prevail on an ineffective assistance of counsel claim, appellant must prove two elements: (1) trial counsel's deficient performance and (2) prejudice as a result of that performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L. Ed. 2d 674, 104 S. Ct. 2052]; *Martinez*, *supra*, 226 Cal.App.4th at p. 1189.) Normally, "the failure to object is a matter of trial tactics that an appellate court will seldom second-guess [citation] . . . ." (*People v. Carter* (2003) 30 Cal.4th 1166, 1209.)

Here, defense counsel requested imposition of the statutory minimum restitution fines and the trial court indicated it intended to waive "all fines, penalties, and assessments[] that I am able to waive . . . ." We can perceive no tactical reason for counsel's oversight in failing to correct the court's misstatement when it imposed a restitution fine pursuant to the law as it was in effect at the time of sentencing, rather than the law in effect at the time of the effect. It appears more than likely that the court would have imposed the minimum restitution fund fine using the $200 minimum that was in effect when appellant

committed his crimes had counsel raised an objection at the sentencing hearing. Accordingly, we conclude that trial counsel's performance was deficient. (*Martinez, supra,* 226 Cal.App.4th at p. 1190.)

The sentencing minutes and abstract of judgment must be amended accordingly.

DISPOSITION

The judgment is modified to stay the term on count 3, and to reduce the restitution fine, as well as the parole revocation restitution fine, to the statutory minimum of $200.00. In all other respects, the convictions and judgment are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.